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GIGANEWS, INC., and  
9 LIVEWIRE SERVICES, INC.

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION

13 PERFECT 10, INC., a California  
corporation,

14 Plaintiff,

15 v.

16 GIGANEWS, INC., a Texas  
17 Corporation; LIVEWIRE  
SERVICES, INC., a Nevada  
18 corporation; and DOES 1 through  
100, inclusive,

19 Defendants.

20  
21 GIGANEWS, INC., a Texas  
Corporation; LIVEWIRE  
22 SERVICES, INC., a Nevada  
Corporation,

23 Counterclaimants,

24 v.

25 PERFECT 10, INC., a California  
26 Corporation,

27 Counterdefendant.

Case No.: 11-cv-07098-ABC (SHx)

**DISCOVERY MATTER**

*Before Hon. Stephen J. Hillman*

**REPLY DECLARATION OF JOSEPH  
S. BELICHICK IN SUPPORT OF  
DEFENDANTS *EX PARTE*  
APPLICATION FOR AN ORDER  
SHORTENING TIME FOR HEARING  
ON (1) MOTION FOR LEAVE TO  
SEEK FURTHER DISCOVERY  
RELIEF FOLLOWING THE COURT'S  
DISCOVERY COMPLIANCE  
DEADLINES; AND (2) MOTION FOR  
CLARIFICATION OF THE JUNE 5,  
2014 ORDER REGARDING  
DEFENDANTS' MOTION TO  
COMPEL DISCOVERY  
COMPLIANCE FROM PERFECT 10,  
AND MOTION FOR LEAVE**

Date: *Ex Parte/on shortened time*

Time: *Ex Parte/on shortened time*

Courtroom: 550 (Roybal)

Discovery Cut-off: June 30, 2014

Pretrial Conference: January 19, 2015

Trial Date: January 27, 2015

1 I, Joseph S. Belichick, hereby declare as follows:

2 1. I am an associate at Fenwick & West, LLP, counsel for Defendants in  
3 this action. I submit this further declaration in support of Defendants' *Ex Parte*  
4 Application for an Order Shortening Time for a Hearing on (1) Defendants' Motion  
5 for Leave to Seek Further Discovery Relief Following the Court's Discovery  
6 Compliance Deadlines, and (2) Defendants' Motion for Clarification of the June 5,  
7 2014 Order Regarding Defendants' Motion to Compel Discovery Compliance from  
8 Perfect 10, and Defendants' Motion for Leave. I have personal knowledge of the  
9 facts in this declaration.

10 **History of Defendants' Productions to Perfect 10**

11 2. Throughout the discovery process, Defendants have cooperated with  
12 Perfect 10 to work through any technical issues and to produce documents in a  
13 readily usable format. Defendants' productions to Perfect 10 use industry-standard  
14 formats, with load files compatible with standard eDiscovery tools and  
15 accompanying TIFFs. Additionally, Defendants' productions typically contain  
16 associated text information that includes the text of the native file in a computer  
17 readable format. *See* Dkt. 260-4 [Declaration of David Tran in Support of  
18 Defendants' Position Regarding Joint Stipulation as to Perfect 10's Motion for  
19 Sanctions]. Attached as **Exhibit A** is a copy of Defendants' production log in this  
20 case.

21 3. Perfect 10 did not complain about Defendants' February 7, 2014 and  
22 February 12, 2014 productions, which used the same structure of TIFF images,  
23 associated text files and metadata. Giganews provided standard instructions for  
24 accessing the files in these productions, but Perfect 10 never responded as to  
25 whether it actually followed those instructions.

26 4. Following Defendants' productions on March 17, 18, and 28, 2014,  
27 Perfect 10 informed Defendants that it had encountered technical issues with these  
28 productions. In response, on April 3, 2014, Defendants reissued these productions

1 on an encrypted hard drive. Attached as **Exhibit B** is a copy of the letter  
2 accompanying this replacement production on April 3, 2014.

3 5. After serving this replacement production on April 3, 2014,  
4 Defendants discovered technical issues involving its Vol007 production, which  
5 appeared in the original March 28, 2014 production and April 3, 2014 update.  
6 Upon discovering these errors, on April 9, 2014, Defendants replaced their previous  
7 production of March 28, 2014. Attached as **Exhibit C** is a copy of the letter  
8 accompanying this replacement production on April 9, 2014. This April 9  
9 correspondence provided that: “This production replaces the previous March 28th  
10 production. Please destroy or return the March 28th production, which Perfect 10  
11 received separately by disk and which is also Vol007 on the hard drive we recently  
12 sent.”

13 6. Following the April 3, 2014 production, Perfect 10 informed  
14 Defendants that it still had technical issues with the production originally made on  
15 March 17, 2014. Defendants asked whether Perfect 10 had followed our  
16 instructions for decrypting and accessing the March 17, 2014 document production.  
17 Again, Perfect 10 did not respond.

18 7. On May 7, 2014, Defendants once again reissued the March 17, 2014  
19 document production, this time on three separate hard drives. Attached as **Exhibit**  
20 **D** is a copy of the letter accompanying this further replacement production on May  
21 7, 2014. The letter also asked Perfect 10 to once again confirm that it had followed  
22 Defendants’ instructions for decrypting and accessing productions.

23 8. On May 23, 2014, *over two weeks after the May 7 production*, Perfect  
24 10 sent Defendants an email requesting “a disk similar to the most recent one you  
25 provided but with a complete set of text files[.]” When Defendants attempted to  
26 clarify Perfect 10’s request, Perfect 10 merely referred Defendants to its  
27 supplemental briefing regarding Perfect 10’s Motion for Evidentiary Sanctions  
28

1 Against Giganews. Attached as **Exhibit E** is a copy of this May 23, 2014 email  
2 exchange.

3 9. On May 28, 2014, Perfect 10 again raised issues regarding “text  
4 files”—without further clarification. Again, Defendants investigated the issue.  
5 Unable to determine the basis for Perfect 10’s complaint, Defendants again asked  
6 for clarification. Attached as **Exhibit F** is a copy of the email exchange between  
7 Lynell Davis and Kathleen Lu from May 28, 2014 through May 30, 2014.

8 10. Perfect 10 never responded to any of Defendants’ requests for  
9 clarification regarding their purported technical issues regarding “text files.”

10 **The Court Has Already Approved of Defendants’ Productions**

11 11. On June 2, 2014, the Court denied Perfect 10’s Motion for Evidentiary  
12 Sanctions Against Giganews. *See* Dkt. 295. In its Order, the Court recognized that  
13 Defendants’ productions complied with industry-standard formats. *Id.* at 4 (“In the  
14 court’s experience, parties often wage battles over the feasibility of producing  
15 exactly the kind of format of document production which Giganews here has  
16 willingly provided to Plaintiff.”). The Court also noted that, in its view, Perfect  
17 10’s asserted issue with “text files” was “simply another technical problem that  
18 plaintiff has experienced in attempting to access the discovery records.” *Id.* at 5.

19 12. Before filing its Opposition to Defendants *Ex Parte* Application,  
20 Perfect 10 had not mentioned any further issues regarding “text files” at any point  
21 after the Court’s June 2 Order.

22 **Mr. Laven Reviewed a Drive Containing an Outdated, Irrelevant Production**

23 13. Perfect 10 does not provide adequate detail about the origin or contents  
24 of the hard drive it allegedly sent to Paul Laven of Merrill Corporation (“Merrill”)  
25 for analysis. For instance, Perfect 10 does not provide any declaration under  
26 penalty of perjury that the hard drive delivered to Merrill contained unaltered  
27 versions of productions made by Defendants. Also, despite the fact that Defendants  
28 reissued their March 17, 2014 production to Perfect 10 on May 7, 2014 on multiple

1 drives, Mr. Laven's declaration that Perfect 10 filed in support of its Opposition to  
2 Defendants' *Ex Parte* Application only mentions a single drive. *See* Dkt. 332-2 at  
3 ¶¶ 3-4. Perfect 10 has not provided any evidence that it forwarded this most recent  
4 production to Merrill for analysis. Furthermore, Mr. Laven's declaration says  
5 nothing about when Perfect 10 first engaged Merrill to assist with eDiscovery, and  
6 we have no reason to believe that Perfect 10 retained Merrill any earlier than mid-  
7 June 2014.

8 14. As established above, Defendants produced a hard drive containing six  
9 volumes (Vol002 through Vol007) to Perfect 10 on April 3, 2014. Following this  
10 production, Defendants discovered technical issues involving Vol007 production  
11 and set forth a replacement production fixing these issues on April 9, 2014. Based  
12 on the description of the hard drive submitted by Perfect 10 appearing in his  
13 declaration, *see* Dkt. 332-2 at ¶¶ 3-4, Mr. Laven appears to have conducted his  
14 analysis on a hard drive containing this outdated production from April 3, 2014,  
15 which admittedly contains errors. *See* Exhibit A.

16 15. Perfect 10 has consistently ignored this April 9 replacement  
17 production. Perfect 10 never responded to Defendants' April 9 correspondence.  
18 Nor did Perfect 10 ever return the erroneous Vol007 production or confirm that it  
19 had been destroyed, as Giganews requested. In fact, on May 23, 2014, Perfect 10  
20 issued its Second Set of Requests for Admission to Giganews, which contained  
21 documents from this earlier, erroneous March 28 production. Specifically, Exhibits  
22 6-8, 13 and 16 contained documents from this incorrect production.

23 **Ms. Davis' Misstatements About and Inadequate Supervision of Discovery**  
24 **Compliance Efforts**

25 16. The Declaration of Lynell Davis filed in support of Perfect 10's  
26 Opposition states that "Defendants served the first of their subpoenas for the  
27 production of documents upon a third-party, now specially represented for the  
28 purposes of his document subpoena by Perfect 10, on March 31, 2014, upon Mr.

1 Yamato.” See Dkt. 332-1 at ¶ 7. This statement is false. As I stated in my reply  
2 declaration regarding Defendants’ Motion to Compel Discovery Compliance from  
3 Craig Ken Yamato II, Mr. Yamato was not served with a document subpoena until  
4 April 24, 2014. See Dkt. 317-2 at ¶¶ 19-21.

5 17. Defendants noticed the deposition and document subpoenas of Sheena  
6 Chou on May 23, 2014. Attached as **Exhibits G.1 and G.2** are copies of the  
7 deposition and document subpoenas of Sheena Chou, dated May 23, 2014,  
8 respectively. Perfect 10 refused to accept service of either subpoena.

9 18. I am informed and believe that upon receiving the copies of the  
10 subpoenas, Perfect 10 warned Ms. Chou that Defendants intended to serve her. For  
11 weeks, Ms. Chou attempted to evade service. After conducting surveillance, a  
12 process server finally served Ms. Chou on June 13, 2014. Attached as **Exhibits**  
13 **H.1 and H.2** are true and correct copies of the proofs of service for the deposition  
14 and document subpoenas of Sheena Chou, respectively.

15 19. Ms. Davis’ declaration also provides that she has been communicating  
16 with third-party witnesses about their compliance with the Court’s orders (Dkts.  
17 318 and 322). See 332-1 at ¶¶ 2-6. But, beyond stating that she has instructed these  
18 third-party witnesses about performing the court-ordered searches, Ms. Davis does  
19 not set forth specific facts demonstrating that she is supervising or directing the  
20 search for any documents.

21 **Defendants’ Interaction with the Court Clerk Regarding the Order**  
22 **Compelling Discovery Compliance from Third-Party Witnesses**

23 20. On June 5, 2014, the Court entered its order granting Defendants  
24 Motion to Compel Further Discovery Compliance from Third-Party Witnesses.  
25 Dkt. 312. Although the body of the Order specifically refers to Appendix A,  
26 Appendix B, Appendix C, and Appendix D, the Order attached only Appendix A to  
27 the Order.

1           21. I immediately contacted Perfect 10 and its affiliated Third-Party  
2 Witnesses and attempted to reach agreement that they would use the search terms  
3 on all Appendices. But they refused and claimed that they did not have to use all of  
4 the search terms listed in the Appendices unless the Court attached each Appendix  
5 to the Order. They also refused to stipulate to allowing Defendants to file a motion  
6 for reconsideration. *See* 332-1[Davis Decl.] at 7-9, Ex. 1.

7           22. In an effort to avoid burdening the Court with unnecessary motion  
8 practice, my assistant first contacted the ECF Helpdesk and was directed to contact  
9 the Court's relief clerk. My assistant later called the relief clerk, who was on  
10 vacation, and so she sent the Court's clerk a brief email explaining the situation and  
11 asking for direction. When the Court clerk's response did not appear to understand  
12 the situation, I sent the Court clerk an email explaining the situation in more detail,  
13 and informing the Court clerk of Perfect 10 and its affiliated third-party witnesses'  
14 position. I further stated that I would file an *ex parte* application for an order  
15 shortening time and motion for reconsideration, if necessary, but did not want to  
16 burden the Court.

17           23. On June 16, 2012, the Court entered an amended order that included  
18 all of the Appendices. *See* Dkt. 318.

19 **The Relative Volume of Perfect 10's Productions**

20           24. The relative sizes of Perfect 10's and Defendants' document  
21 productions do not reflect the extent of each party's discovery compliance. Perfect  
22 10's production contains a number of very large files, including pictures and video.  
23 Also, the majority of documents produced by Perfect 10 in this matter were  
24 produced in a "dump" of over a million documents in October of 2013, *before*  
25 *Defendants propounded any document requests*. The relevance of these documents  
26 is in dispute. Indeed, the fact that the Court has granted multiple discovery  
27 compliance orders against Perfect 10 confirms that the sheer volume of Perfect 10's  
28 production has little bearing on its discovery compliance.

**Perfect 10's Motion for Sanctions Pursuant to Fed. R. Civ. P. 56(h) for Submission of Declarations in Bad Faith**

25. Perfect 10 recently filed a motion claiming that Defendants filed "bad faith" declarations in support of their opposition to Perfect 10's unsuccessful motion of partial summary judgment. Dkt. 325. The Court has found that this motion is procedurally deficient. Dkt. 327.

26. Defendants have already responded in writing to Perfect 10's allegations about filing "bad faith" declarations and will do so again if and when they have to file an Opposition to Perfect 10's sanctions motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of June, 2014 in Mountain View, California.

/s/ Joseph S. Belichick

Joseph S. Belichick

FENWICK & WEST LLP  
ATTORNEYS AT LAW  
SAN FRANCISCO